

From first reception center to pre-removal facilities – Supreme Administrative court of Greece decides that Turkey is a safe third country

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Since the entry into force of the “EU-Turkey Deal” on 20 March 2016, the Greek Hotspots have fundamentally transformed their function from the initial reception centres they were originally intended to be, to deportation centres. This follows from the first formulation of the statement published as a press release. Under the statement, persons who cross irregularly from Turkey to Greece after 20 March 2016 are to be returned to Turkey. The Supreme Administrative Court of Greece “Council of State” (CoS) ruled on 22 September 2017 that Turkey is a so-called “safe third country” in two cases of Syrian refugees seeking international protection to the eastern Aegean islands coming from Turkey. They moved to the CoS following a negative decision by the Greek Asylum Authority. Although the judgment concerns individual cases, it is groundbreaking. It mainly concerns the legality of accelerated border procedures implemented in the Hotspots, the integration of the European Asylum Support Office (EASO) and the concept of the “safe third country”.



The concept of the “safe third country” concerns those who “might have found protection”. This has been discussed controversially in the context of the EU-Turkey Deal (see e.g. [here](#) and [here](#)).

For a classification as “safe”, refugee protection in the respective state must comply with the provisions of the Asylum Procedures Directive (Art. 38). Third-country criteria are standardized as follows:

- The principle of *non-refoulement* outlined in the 1951 Geneva Convention must be respected;
- there must be no danger to life and freedom for reason of belonging to a social group, and no danger of serious harm; and
- there must be the possibility to submit an asylum application and, in the case of recognition, a status corresponding to the requirements of the Geneva Convention.

Furthermore, a link between the applicant and the corresponding third country is required, which makes a return “reasonable”.

Principle of non-refoulement

Concerning the principle of *non-refoulement*, the CoS has invoked letters of diplomats as evidence. In a one-page letter from Turkey's Permanent Representative to the EU Commission, it is assured that protection against repatriations will be ensured. The applicants' arguments and other independent reports challenged this assertion. Many of the arriving people in Greece report on collective expulsions on the Turkish-Syrian border. If Turkey would send people back to Syria, Greece would be violating the principle of non-refoulement and the ban on collective expulsion. Regardless of the actual events, a Turkish Presidential Decree (No. 676) shines light upon the robustness of abstract legal regulations in Turkey. The Decree states that protection-seekers and beneficiaries can be deported at any stage of their application if they are identified as members of a terrorist organization. Removal can take place even in the absence of a court decision. In light of a significant rise in detention in Turkey on the basis of suspicion of terrorism, there appears to be a real risk that deportations contrary to international law may take place. The Court did not make the recent Decree a subject of the decision.

Danger to life and freedom for reasons of belonging to a social group

The Court also made clear that there is no danger to life and freedom for reasons of belonging to a social group and no danger of suffering serious harm in Turkey, concluding that incidents involving one of the applicants at the border crossing from Syria to Turkey did not give rise to such an indication. The Court rejected alleged reports by the applicants that Turkey takes Syrian asylum seekers into administrative detention after their arrival, holding these to be unsubstantiated. However, recent reports that were not considered by the Court confirm this practice.

Status corresponding to the requirements of the Geneva convention

In a "safe third country", there must be the possibility of submitting an application for asylum and, in the case of recognition, the possibility to obtain a status corresponding to the requirements of the Geneva Convention. Turkey has ratified the Convention under a geographic reservation that allows only persons coming from Europe to seek protection. Although it is widely believed that ratification of the Convention is not necessary to declare a country "safe" in that regard, it is difficult for Member States to check whether persons can receive equivalent protection in states which have not ratified the Convention (*Vedsted-Hansen*, Part D. IV. in Hailbronner/Thym, point 3). This criterion is particularly critical about Turkey, mainly because a different protection regime applies to Syrian applicants than to all other persons. They are subject to so-called "Temporary Protection" (according to the Temporary Protection Regulation), which is group-specific and precludes a separate application for asylum. Already within the Appeals Committee, there was a disagreement about the possibility of a Convention-compliant status. The wider legal community has also questioned the applicability of the safe third country in light of the above noted concerns (cf. for an extensive discussion under IV. 6.)

Reasonable link

Beyond the criteria above, that regard the “safety” of the third country, a connection between the applicant and the country, that makes a return “reasonable”, is also required by Art. 56 para. 1 lit. f Greek Law 4375/Art. 38 para. 2 APD. In the recent CoS case, the applicant had spent 1.5 months in Turkey without encountering significant problems. According to the Court, this is reasonable. Criteria were not provided. The EU Commission considers the transit alone as sufficient, the Greek Asylum Service is assuming a time limit of around ten days. Recent decisions of the Appeals Committee, on the other hand, indicate which factors should be taken into account: not only the temporal dimension is decisive, but also questions concerning social integration, as well as ethnic and cultural links and the existence of relatives in the third country. What, for example, is the link of a person who has been staying in Turkey for three weeks in transit, but kept hidden and never had contact with Turkish citizens or authorities? “Reasonable” therefor appears to be contingent upon a case-by-case examination and the consideration of the actual circumstances instead of a fixed time limit; not for nothing the criterion is individually protective.

Preliminary Ruling

The question of the interpretation of Art. 38 APD could have been submitted to the Court of Justice of the European Union (ECJ) for review in a preliminary ruling procedure (Art. 267 of the Treaty on the Functioning of the European Union). According to Art. 267 para. 3 TFEU before a court of last instance like the CoS the right to a submission can even turn into a duty of submission. In the C.I.L.F.I.T. decision the ECJ acknowledged an exemption from the duty of submission in cases where the questions were previously considered by the ECJ, or where a similar question concerning an identical provision was answered previously, or where there is considered to be no reasonable doubt regarding the correct application of EU Law, or where the case is about interim measures.

The CoS concluded with a majority of 13 to only 12 judges that there is no obvious or valid doubt regarding the correct application of EU Law. Following the so-called “Acte-Clair doctrine” which was referred to in the C.I.L.F.I.T. decision, “the correct application of EU law shall be so obvious that there is no room for any reasonable doubt as to the decision of the question”. Against the majority, the 12 dissenting judges stated that the Court ought to submit a request to the ECJ. In their opinion, the interpretation of a “safe third country” in the judgement in accordance with Art. 38 APD is not fully made and raises valid doubts regarding several questions.

In the cases before the CoS, the questions raised in the dissenting opinion, considered alongside the fact that 12 of 25 judges would have supported a reference to the ECJ, for itself already clearly demonstrates that there was “reasonable doubt”. Especially since the CoS did not give answers to the questions raised by the dissenting opinion. Additionally, the broad scientific discussion and the diverse dispute on the concept of the “safe third country”, in particular with regard to the question of when a state can provide a status corresponding to the requirements of the Geneva Convention, should have necessarily been taken into account and at least raised “reasonable doubts” – if not even lead to a different outcome. Ultimately, there are strong indications that the Court was in fact obliged to submit a request for a preliminary ruling to the ECJ.

Assuming the infringement of Art. 267 TFEU, in the Greek law a legal remedy against the state might be based on Art. 20 para. 1 Greek Constitution in conjunction with Art. 105 of the introductory law of the Greek Civil Code. Another possibility might be a complaint to the European Court of Human Rights (ECtHR). In the case of Schipani, the ECtHR stated that the non-submission infringed Art. 6 ECHR, but based its reasoning mainly on the failure to state reasons for the non-submission (para. 72). Whether this can be assumed in the present case must be left to a more in-depth discussion. Proceedings at the ECtHR are now being sought. However, a procedure has not yet been initiated.

Outlook

The judgment confirms and strengthens the controversial so-called EU-Turkey Deal as a mechanism for establishing Turkey as a “safe third country”. The decision represents a concerning renewed justification for the procedures on the Greek islands, and will affect a considerable number of applicants for international protection. An employee of the Greek Asylum Service recently publicly confirmed that it might be possible after the Court’s decision to anticipate faster decisions in other proceedings by Syrian applicants. This also means more negative decisions are taken by the Greek Asylum Service regarding the question whether Turkey is a “safe third country”, and if no legal remedies are introduced, these decisions may be enforced, and asylum seekers expelled to Turkey. The judgment has a signaling-effect. Not only for the Greek Asylum Service, but also for the asylum seekers. They now see even less chance to pursue their asylum application in the EU. Many are desperate to the extent that they may consider returning voluntarily. Since the establishment of the EU-Turkey Deal it was challenged by multiple actors and the ongoing procedures show the questionability of any “deal” that follows this idea such as a possible agreement with Libya.

The contribution is part of a series of three articles regarding the EU-Turkey Statement and the EU Hotspot Approach in Greece – it is preceded by yesterday’s text by ELENI TAKOU as well as CATHARINA ZIEBRITZKI’s contribution this morning.

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